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UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

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**Civil Action No.05-10618-RCL**

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**RAUL GONSALVES,  
Petitioner,**

**v.**

**MICHAEL THOMPSON,  
Respondent.**

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**EXHIBITS FOR PETITIONER'S  
REPLY TO RESPONDENT'S  
MOTION TO DISMISS & ANSWER**

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**Raul P. Gonsalves W68842  
Pro Se  
P.O. Box 1218  
Shirley, MA 01464**

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Exh. A, Motion to Dismiss (Filed in the Barnstable Superior Court, by trial counsel).

Exh. B, Pages 30-33 of Brief to Mass.App.Ct. on Direct appeal, (No.01-P-428).

Exh. C, Photo of vehicle's number.

Exh. D, Motion to Inspect Evidence.

Exh. E, Pages 18 & 19 of Application For Leave to Obtain Further Appellate Review Post-Conviction, No.FAR-14483.

Exh. F, Petition pursuant to M.G.L.c. 211, § 3 to SJC, No.SJC-09217.

Exh. G, Page 10 of Petitioner's Memorandum in support of Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. No.05-10618\_RCL.

Exh. H, Pages 40 & 41 of petitioner's Memorandum of law in support of Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, No.05-10618-RCL.

# Exhibit A

Case 1:05-cv-10618-RWZ Document 19 Filed 07/01/2005 Page 4 of 33  
The photos were not given to the V.I.N. number and the engine number on the vehicle at issue. The S has not been deprived of any exculpatory evidence and the F.N. 1. The photos were not given to either counsel for approx. COMMONWEALTH OF MASSACHUSETTS motion is denied (b one year. 77C a. 7/1/05

BARNSTABLE, SS/

SUPERIOR COURT  
INDICTMENT #48336

O'Neill. x  
36 2/15/06

COMMONWEALTH OF MASSACHUSETTS

MOTION TO DISMISS

RAUL GONSALVES

The defendant respectfully moves, Pursuant to Mass.R.Crim. 13, article 12 of the Massachusetts Declaration of Rights and the Due Process Clause to the United States Constitution, that the above titled matter be dismissed due to the Commonwealth's loss or destruction of evidence, thus denying the defendant his right to a fair trial. See also, Commonwealth v. Willie, 400 Mass 427 (1987); Commonwealth v. Olsewski, 401 Mass 749 (1988); and Commonwealth v. Troy, 405 Mass 253 (1989).

In the alternative the defendant moves "that all testimony and evidence relating to the lost or destroyed evidence be excluded from trial." Olszewski, *supra*, at 753.

By his attorney

Richard Gavin Barry  
4728 Falmouth Rd.  
Cotuit, MA 02635  
BBO# 5554298

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100- Acta Variae A. I. Welch notched

present exculpatory evidence which is available to the prosecution'. Olszewski, supra, at 753-754.

In Commonwealth v. Neal, 391 Mass. 1 (1984), the court "indicated that, where evidence is lost or destroyed, a defendant would be entitled to relief if he establishes a reasonable probability, based on concrete evidence rather than fertile imagination, that access to the evidence would have produced evidence favorable to his cause." Id. at 754

The test is thus: when potentially exculpatory evidence is lost or destroyed, a balancing test is employed to determine the appropriateness and extent of remedial action. The trial judge must weigh the culpability of the Commonwealth and its agents, the materiality of the evidence, and the potential prejudice to the defendant. Olszewski, id., at 755, 757, citing Commonwealth v. Willie, 400 Mass 427 (1987).

It was noted, Olszeski, id., at 757 n. 7 that "'Culpability' and 'bad faith' are not interchangeable terms. Negligence or inadvertence are less culpable than bad faith, but they are nevertheless culpable and must be accounted for in the balancing procedure."

In the case at bar, Falmouth Police seized an all terrain vehicle that they believed to be stolen. They were unable to clearly identify the V.I.N. number on said vehicle and could only guess as to what the last two numbers were. The Commonwealth is in possession of a Certificate of Origin for the motor vehicle which also lists the engine number of 3GG-154098. Police reports do not indicate that the Commonwealth or its agents ever checked the engine number of the vehicle to determine if this was in fact a stolen motor vehicle. Counsel filed a motion to inspect the evidence and when an investigator went to the Falmouth Police to check the engine number, he was informed that said vehicle had been released to a repossession company. The inability of the defendant to conduct this investigation has greatly prejudiced the defendant from being able to obtain exculpatory evidence and this indictment should be dismissed.

Respectfully submitted  
Raul Gonsalves  
By his attorney

  
Richard Barry  
4728 Falmouth Rd  
Cotuit, MA 02635  
BBO# 554298

DATE: December 17, 1999

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# Exhibit B

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critical aspect of the charge, the conviction must be reversed.

B. The Trial Judge Should Have Dismissed The Case Or Imposed An Alternative Sanction On The Admissibility Of The Vehicle Identification Evidence Because Of The Commonwealth's Failure To Preserve The Vehicle For Defense Inspection

In pre-trial discovery, the defendant obtained an order permitting him to inspect the vehicle which is the subject of these charges. (R.A. 7-8). When his investigator went to the police station to carry out this task, however, he discovered that the vehicle had already been turned over to a salvage company. (Tr.I 180-182).

While the police tried to suggest otherwise, it is apparent that the disposal of the evidence in this manner was inconsistent with usual police practice. (Tr.I 149-152, 166, 179, 185-186). The police did not obtain approval from the prosecutor's office before discharge of the evidence and there was some question whether the vehicle had ever been properly logged in and out. (Tr.I 129, 180-181).

extent to which the number had been altered and the likelihood that a rider of the vehicle would have known about the alteration. The photographs did not reveal where the VIN was located on the vehicle, its size in relation to the rest of the vehicle, and whether it was otherwise obscured.

Inspection of the vehicle could have shed light on those areas and on the related issue whether the scratches on the final two numbers appeared to be intentionally and maliciously inflicted. Only a view of the entire vehicle could reveal whether the scratches may have been the result of some earlier mishap.

The police are clearly responsible for the limitations imposed on the defendant's ability to present a defense. There is no discernible reason why they could not have retained the evidence at least until defense counsel was provided an opportunity to view it and take any desired photographs. This is not a case involving an inadvertent destruction or loss where the available photographs would be an acceptable substitute. Cf.,

# Exhibit C

NY4360W014YAN15A7008

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# Exhibit D

Aug 18, 1999 motion allowed,  
By the Court, Conon, J.  
Nancy A. Reid, <sup>13</sup>  
asst. Clerk

## COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, S.S.

BARNSTABLE SUPERIOR COURT  
INDICTMENT # 48336 BARNSTABLE, ss.

COMMONWEALTH )

V. )

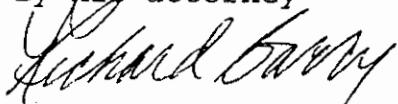
RAUL GONSALVES )

FILED AUG 18 1999

MOTION TO INSPECT  
EVIDENCE

Now comes the defendant in the above captioned matter and moves that this honorable court order that counsel be allowed to inspect and photograph the motor vehicle, V.I.N. # Jy43GGW04XA154738, which is the subject of this litigation.

Respectfully submitted  
Raul Gonsalves  
By his attorney



Richard Gavin Barry  
4728 Falmouth Rd  
Cotuit, MA 02635  
BBO# 554298

DATE: August 12, 1999

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# Exhibit E

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Due Process requires that all "be informed as to what the state commands or forbids", and that "men of common intelligence" not be forced to guess at the meaning of the law. Smith v. Goguen, 415 U.S. 566, 574 (1974). A person of common intelligence would assume that an off-road vehicle is not a "motor vehicle" because it cannot be registered or operated as a motor vehicle. If a person operates an off-road vehicle on a public way they'll be arrested because it is not a "motor vehicle". However, if it is stolen, then it is a motor vehicle and one could receive up to fifteen years imprisonment. The police and prosecutor now have it both ways.

#### CONCLUSION

The Appeals Court decision is contrary to clearly established law, as established by the United States Supreme Court and the Supreme Judicial Court of Massachusetts. The search of the private premises without a warrant or consent, or any circumstances that fall within the narrowly drawn exceptions of exigentie, clearly violated the Federal and State Constitution, and counsels failure to litigate the matter constituted ineffective assistance of counsels.

Further, the defendant/appellee clearly stands convicted under the wrong statute, in violation of the Fourteenth Amendment of the United States Constitution. An off-road vehicle is clearly outside the scope of the statute. The term "motor vehicle" has never been known

# Exhibit F

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, SS

SUPREME JUDICIAL COURT  
No. SJC-09217

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GONSALVES, Raul P.

Petitioner

v.

COMMONWEALTH

Respondent

---

ON APPEAL FROM AN ORDER  
OF A SINGLE JUSTICE OF THE  
SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
DENYING PETITIONER'S G.L.C. 211, § 3  
PETITION

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MEMORANDUM

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RAUL P. GONSALVES, PRO SE

W68842  
P.O. BOX 1218  
SHIRLEY, MA 01464

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<u>Kolender v. Lawson</u> , 461 U.S. 352, 358, 103 S.Ct. 1855 (1983) . . . . .	3
<u>Pielech v. Massasoit Greyhound, Inc.</u> , 423 Mass. 534, 539 (1996) . . . . .	8
<u>Smith v. Goguen</u> , 415 U.S. 566, 576, 94 S.Ct. 1242, 1249 (U.S. Mass. 1974) . . . . .	3, 4
<u>U.S. v. Hussein</u> , 230 F.3d 109, 114 (D.Me. 2002) . . . . .	3
<u>Walters v. Metropolitan Ed. Enterprises, Inc.</u> , 117 S.Ct. 660 (1997) . . . . .	4

Statutes and Court Rules

M.G.L.A. Const.Pt.1,Art. 30, . . . . .	8, 9, 11
Mass.G.L.c. 90, § 1, . . . . .	3, 5-8, 10
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Mass.G.L.c. 211, § 3, . . . . .	1
Mass.G.L.c. 266, § 28, . . . . .	1, 3-5, 7, 9-10
Mass.G.L.c. 266, § 60, . . . . .	4, 12
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2004, the Petition was denied. (Cordy, J.).

REASONS WHY THE DEFENDANT CANNOT  
PROCEED THROUGH NORMAL APPELLATE PROCEDURES

This matter involves a question of a state statute that has already been resolved through the normal appellate procedures. However, it is believed that the Mass.App.Ct's decision on this matter is inconsistent with the Legislature's intent and the Massachusetts General Laws.

Although the defendant blames the Mass.App.Ct.'s decision on his appeals counsel's incorrect argument that a 4-wheeler is like a motorized bicycle. When an appellate court has already reviewed the defendant's conviction, a claim based on the same issues "but newly attired in the grab of ineffective assistance of counsel is [duplicative]". Com. v. Silva, 25 Mass.App. Ct. 220, 228, 517 N.E.2d 182 (1987). Therefore, it is believed that the appeals court would not even consider this matter since they have already reviewed this issue in the defendant's direct appeal. (Com. v. Gonsalves, 56 Mass.App.Ct. 506 (2002) ).

It is also believed that since this matter involves a question of a Massachusetts Statute and a question of law, this matter should be addressed by the States highest court, the Supreme Judicial Court.

If this matter stands as is the police and prosecutor will then be able to proceed with selective

922, quoting Smith v. Goguen, 415 U.S. 566, 573n.8, 97 S.Ct. 1242, 1247n.8 (1974). A person of common intelligence would assume that a 4-wheel off-road vehicle is not a "motor vehicle" because it cannot be operated or registered in Massachusetts as a "motor vehicle". A drivers license is not required to operate an off-road vehicle. (M.G.L.A. 90B § 26, A motor vehicle operator's license or learner's permit shall not be required for the operation of a snow vehicle or a recreation vehicle.) However, under the appeals court interpretation of the statute, c. 266, § 28, if a person is in possession of a stolen recreation vehicle they will lose their motor vehicle operator's license for a one year period, as required by statute. If a 4-wheeler, or recreation vehicle is not considered a "motor vehicle" in any other context, then it should not be considered a "motor vehicle" for theft or receiving purposes either. Absent indication to the contrary, words in statute are assumed to bear their ordinary, contemporary, common meaning. Walters v. Metropolitan Ed. Enterprises, Inc., 117 S.Ct. 660, 664 (1997).

The manufacturer was compelled to notify owners and operators of this 4-wheel off-road vehicle, that said vehicle was not manufactured for use on public streets, roads, or highways, and that such use is prohibited by law. (R.A. 23).

The criminal statute for receiving a stolen motor vehicle, c. 266, § 28, refers to c. 90, § 1, as defining "motor vehicle or trailer", (See c. 266, § 28, Cross References; R.A. 26) and case law establishes that, Statutes which relate to a common subject matter should be construed together so as to constitute an harmonious whole. Commonwealth v. Smith, 431 Mass. 417, 424 (2002).

It is believed that the legislature's intent in enhancing the criminal penalty for theft of, or possession of stolen "motor vehicles" was to further punish people for depriving someone of their means of transportation and not for recreation vehicles that are not a means of transportation but instead are only for recreational purposes. Further, it is believed that the appeals court decision on this issue is erroneous and contrary to legislatures intent, the Mass.G.L.A., art.30 of the Mass. Declaration of Rights, and the Due Process Clause of the Fourteenth Amendment. That the Mass.App.Ct. took it upon themselves to interpret the term "motor vehicle" as encompassing off-road vehicles, when the term "motor vehicle" has never been known to encompass such vehicles. It is believed that the appeals court decision and interpretation amounted to judicial legislation which is forbidden by art.30 of the Massachusetts Declaration of Rights.

Declaration of Rights. Pielech v. Massasoit Greyhound, Inc., 423 Mass. 534, 539, 668 N.E.2d 1298 (1996). It is believed that the Mass.App.Ct. had no right to read into the "Motor Vehicle" theft statute G.L.c. 266, § 28 , "a provision which the Legislature did not see fit to put there. . ." King v. Viscoloid Co., 219 Mass. 420, 425, 106 N.E.2d 988 (1914). To do so amounted to judicial legislation, which is forbidden by art. 30 of the Massachusetts Declaration of Rights. See Justice Qua's comments in Commonwealth v. Isenstadt, 318 Mass. 543, 548, 62 N.E.2d 840 (1945), this court is under a duty 'to avoid judicial legislation in the guise of new constructions to meet real or supposed new popular viewpoints, preserving always to the Legislature alone its proper prerogative of adjusting the statutes to changed conditions'." Commonwealth v. A Juvenile, 368 Mass. 580, 595, 334 N.E.2d 617 (1975). "Statutory language is the principle source of insight into [l]egislative purpose. Hoffman v. Howmedica, Inc., 373 Mass. 32, 37, 364 N.E.2d 617 (1977)." Commonwealth v. Lightfoot, 391 Mass. 718, 720, 463 N.E.2d 545 (1984). Commonwealth v. Smith, 431 Mass. 417, 421 (2000).

When interpreting undefined terms in a statute, it is certainly permissible to draw on the meaning that has settled on the same language in other legislation. See Commonwealth v. Gustafsson, 370 Mass. 181, 187, 346 N.E.2d 706 (1976). However, such an

This matter not only effects the defendant, but also future prosecutions. Where someone that is in possession of stolen recreation vehicles, such as, mini-bikes, go-carts, and off-road vehicles can be charged under the "motor vehicle" theft statute and lose their license to operate a "motor vehicle" and face up to fifteen years imprisonment. It is believed that the proper statute for possession of stolen recreational vehicles is, c. 266, § 60, for receiving stolen goods.

It is believed that the legislature's intent in enhancing the criminal penalty for theft or possession of stolen "motor vehicles" in, c. 266, § 28, was to further punish people for depriving someone of their means of transportation and not for stolen recreational vehicles that are not a form of transportation but instead are for recreational purposes only.

If this matter stands as is the police and prosecutor will have it both ways. If you operate a 4-wheel off-road vehicle on the road, you will be arrested because it is not a motor vehicle, but if it is stolen then it is a motor vehicle and could get up to fifteen years in prison. If a 4-wheel off-road vehicle cannot be registered in Massachusetts or operated as a "motor vehicle" then it should not be considered a "motor vehicle" for theft or receiving purposes either.

**ADDENDUM**

Mass. G. L. A. 90, § 1,

"Motor vehicle", all vehicles constructed and designed for propulsion by power other than muscular power including such vehicles when pulled or towed by another motor vehicle, except railroad and railway cars, vehicles operated by the system known as trolley motor or trackless trolley under chapter one hundred and sixty-three or section ten of chapter five hundred and fourty-four of the acts of nineteen hundred and forty-seven, vehicles running only upon rails or tracks, vehicles used for other purposes than the transportation of property and incapable of being driven at a speed exceeding twelve miles per hour and which are used exclusively for the building, repair and maintenance of highways or Designed especially for use elsewhere than on the travelled part of ways, wheelchairs owned and operated or guided by a person on foot; provided however, that the exception for trackless trolleys provided herein shall not apply to sections seventeen, twenty-one, twenty-four, twenty-four I, twenty-five and twenty-six. The definition of "Motor vehicles" shall not include motorized bicycles. In doubtful cases, the register may determine whether or not any particular vehicle is a motor vehicle as herein defined. If he determines that it should be so classified, he may require that it be registerd under this chapter, but such dtermination shall not be admissible as evidence in any action at law arising out of the use or operation of such vehicle previous to such determination.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT  
FOR SUFFOLK COUNTY  
No. SJ-2003-0378

Barnstable Superior Court  
No. BACR1999-48336

RAUL P. GONSALVES

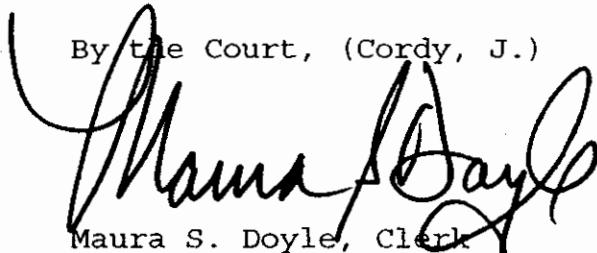
vs.

COMMONWEALTH

JUDGMENT

This matter came before the Court, Cordy, J., presiding, on a petition pursuant to G.L. c. 211, s. 3, and upon consideration thereof, it is ORDERED that the petition be, and the same hereby is, denied without hearing.

By the Court, (Cordy, J.)

  
Maura S. Doyle, Clerk

Entered: February 24, 2004

12/29/04

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH

Page 1

SJC-09217

RAUL P. GONSALVES vs. COMMONWEALTH

ENTRY DATE 03/05/04	CASE STATUS Decided (Rescrpt Opinion)	
STATUS DATE 07/22/04	NATURE Superintendence, c211, s3	
ROUTE TO SJC DESJA	ROUTE DATE 03/02/04	
AC/SJ DKT NO SJ-2003-0378	DAR/FAR NO	
APPELLANT D	FAR APPLICANT	CV/CR CR
BRIEF STATUS	BRIEF DUE	CLERK DL
ARGUED DATE	QUORUM	
DECISION DATE 07/22/04	CITATION 442 Mass. 1016 RSCRPT 08/19/04	
LEAD CASE	RELATION	
TRIAL JUDGE Cordy R.J.	TRIAL CT SJC for Suffolk County	
TC ENTRY DATE 08/11/03	TC DOCKET NO SJ-2003-0378 PUBLIC Y	

Commonwealth  
 Plaintiff/Appellee  
 Awaiting red brief  
 next br. due 05/14/04  
 Active 08/18/03

Julia K. Holler, A.D.A.  
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 550378 Active 08/18/03 Notify

Raul Gonsalves  
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 MCI Shirley  
 P.O. Box 1218  
 Shirley MA 01464  
 Mem. & Appx. under Rule 2:21  
 9 Main Br.  
 Active 08/18/03 Notify

S.J.C. for Suffolk County  
 (Lower Court: criminal)  
 Office of the Clerk  
 1 Beacon Street, 4th Floor  
 Boston MA 02108  
 Phone: 617-557-1100  
 Active 08/18/03 Notify

\* \* \* D O C K E T \* \* \*

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PAPER DATE ENTRY

1.0 03/05/04 Entered. Notice to counsel.

2.0 03/05/04 MOTION to Waive Filing Fee, filed for Raul Gonsalves by Raul P. Gonsalves, Pro se. \*Fee waived only.

12/29/04

COMMONWEALTH OF MASSACHUSETTS  
SUPREME JUDICIAL COURT  
FOR THE COMMONWEALTH

Page 2

SJC-09217

RAUL P. GONSALVES vs. COMMONWEALTH

\* \* \* D O C K E T \* \* \*

PAPER DATE ENTRY

3.0 03/22/04 SERVICE of Mem. & Appx. under Rule 2:21 for Defendant/Appellant  
Raul Gonsalves by Raul Gonsalves, Pro se.

4.0 07/22/04 RESCRIPT (Rescript Opinion): Judgment affirmed. (By the Court)  
Reasons as on file. Notice sent.

08/20/04 RESCRIPT ISSUED to trial court.

# Exhibit G

The Petitioner renewed his required finding motion at the conclusion of all the testimony and the judge denied it. (Tr.I 216).

#### IV ARGUMENT

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution a person is entitled to access to exculpatory evidence. The Commonwealth's failure to preserve evidence for defense inspection constituted a Due Process violation. Second, under the Sixth Amendment to the United States Constitution and Article 12 of the Massachusetts Declaration of Rights, Petitioner was entitled to the Effective Assistance of Counsel, both at trial and on appeal. Both Counsels failed to raise a viable claim of illegal search and seizure. Appeals Counsel also incorrectly argued the statute issue in the petitioners direct appeal. Third, the State Court interpretation of the statute makes the statute vague and overbroad as applied, in violation of the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Thus, pursuant to 28 U.S.C. § 2254, Petitioner's petition for a Writ of Habeas Corpus should be granted, and he should be released from state custody, or this Court should declare that the judgement being attacked is invalid.

# Exhibit H

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conviction may not alone be sufficient reason for concluding that a prisoner is entitled to the remedy of habeas. See, e.g., Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976); Brecht v. Abrahamson, 507 U.S. 619, 113 S.Ct. 1710 (1993). On the other hand, errors that undermine confidence in the fundamental fairness of the state adjudication certainly justify the issuance of the Federal Writ. See, e.g., Teague v. Lane, 489 U.S. 288, 311-314, 109 S.Ct. 1060 (1989) (quoting Mackey v. United States, 401 U.S. 667, 692-694, 91 S.Ct. 1160 (1971)). The deprivation of the right to the effective assistance of counsel recognized in Strickland is such error. Strickland, 466 U.S. at 686, 697-698, 104 S.Ct. 2052. Cited at Williams v. Taylor, 529 U.S. 362, 374-375, 120 S.Ct. 1495, 1503-1504 (2000).

Based on the foregoing authorities, the record in this case and the petition itself, Petitioner, Raul P. Gonsalves, respectfully urges this Honorable Court to grant him a writ of habeas corpus.

**ADDED PRAYER FOR  
"APPROPRIATE RELIEF"**

The Petitioner, Raul P. Gonsalves, prays that this honorable court grant appropriate relief. That this matter be resolved even after the Petitioner is no longer in State Custody.

The Petitioner faces collateral consequences due to the conviction that is now being challenged. He will be deported due to the conviction and taken away from



